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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BARBARA DAVIS, and REGINALD DAVIS, h/w, *Plaintiffs,* v. **PNC BANK, N.A.** **PNC FINANCIAL SERVICES GROUP INC.** **JOHN DOE TRUST** **JOHN DOE TRUSTEE** **JOHN DOES #s 1-100** *Defendants.*	**CIVIL ACTION NO.** 06-1611(AET)

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COMPLAINT AND JURY DEMAND

COME NOW Plaintiffs, BARBARA AND REGINALD DAVIS, H/W, by way and through their undersigned counsel, MILDENBERG & STALBAUM, P.C., complaining of Defendants, and respectfully aver as follows:

I. INTRODUCTORY STATEMENT

1. Plaintiffs, Barbara and Reginald Davis, h/w, consumers and homeowners in Mercer County, New Jersey, bring this action for damages and other relief against Defendants pursuant to the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 et seq. and common law

breach of contract for the deceptive acts and practices of Defendant PNC Bank, N.A. for improperly applying a lump sum payment on Plaintiffs' home mortgage solely to the principal amount, when it was agreed that the lump sum would be applied on a monthly basis while Plaintiff was undergoing and recovering from surgery.

II. PARTIES

2. Plaintiffs, Barbara and Reginald Davis, husband and wife, are adult individuals and citizens of the State of New Jersey, residing therein at 50 Martin Lane, Hamilton, NJ 08619, the property that is the subject of the mortgage complained of herein.

3. Defendant PNC Financial Services Group Inc. ("PNC Financial") is and was, upon information and belief, a Pennsylvania Financial Institution duly existing under and by virtue of the laws of the State of Pennsylvania, having its principal place of business at 249 Fifth Avenue, One PNC Plaza, Pittsburgh, PA 15222.

4. Defendant PNC Bank, N.A. ("PNC") is and was, upon information and belief, a Pennsylvania Financial Institution duly existing under and by virtue of the laws of the State of Pennsylvania, having its principal place of business at 249 Fifth Avenue, One PNC Plaza, Pittsburgh, PA 15222. At all times relevant hereto, PNC is and was a subsidiary of PNC Financial Services Group Inc. and was engaged in the business of sub-prime mortgage lending and servicing.

5. PNC Financial and PNC will be collectively referred to as PNC.

6. Defendant John Doe Trust ("Doe Trust") is, upon information and belief, a trust created pursuant to a certain Pooling and Servicing Agreement ("PSA") the date of inception of which Plaintiffs, after reasonable investigation, are unable to ascertain. The term, "John Doe Trust" is a moniker for the actual name of the trust, which Plaintiffs have been unable to

ascertain. Plaintiffs reserve the right to substitute the actual name of the trust for said moniker after discovery of same in the course of this litigation. Plaintiffs believe and therefore aver that the Doe Trust is the current Holder, beneficial owner, or assignee of the mortgage serviced by PNC. The Doe Trust is a securitization pool of loans, including one of Plaintiffs' loans, that is securitized and certain shares of certificates of which are sold or traded or offered as "asset-backed securities" on the national and international securities markets.

7. Defendant, John Doe Trustee ("Doe Trustee"), is a moniker used herein for the actual name of the trustee of the aforesaid Doe Trust, which Plaintiffs have been unable to ascertain. Plaintiffs reserve the right to substitute the actual name of the trustee for said moniker after discovery of same in the course of this litigation.

8. Defendant, John Does #s 1-100, is a moniker used herein for various individuals and entities that are or may be liable to Plaintiffs for the acts alleged herein, but whose names and/or identities and/or whereabouts Plaintiffs, after reasonable inquiry, have been unable to ascertain. Plaintiffs hereby reserve their right to substitute the true names and locations of these parties should they discovery same in the course of this litigation. Plaintiffs further incorporate each of these parties as Defendants in each and every count listed below.

9. Plaintiffs believe and therefore aver that Defendants, PNC, Doe Trust, Doe Trustee, and John Does #s 1-100 are actual and/or apparent agents of one another and/or each other and/or that each of the said entities is managed, structured, and/or operated, such that each of the said entities is liable for the acts of each of the other entities and/or all of the other said other entities for the actions complained of by Plaintiffs herein.

10. At all times relevant hereto, each of the aforesaid Defendants acted by and through their agents, officers, directors, servants, and employees, who were acting within the

authorized scope and course of their employment and/or agency, under the direct control and at the direction of said Defendants.

III. JURISDICTION AND VENUE

11. Jurisdiction over this matter is conferred upon this court by 28 U.S.C. § 1332(a) because Plaintiffs are citizens of New Jersey, Defendants are citizens of Pennsylvania, and the amount in controversy exceeds $75,000.00.

12. Venue lies in this judicial district in accordance with 28 U.S.C. § 1391(a) in that the events that give rise to this claim occurred here and the property that is the subject of this action is situated in this district.

III. CAUSE OF ACTION

13. On or about October 26, 2000, Plaintiffs Barbara and Reginald Davis obtained a simple interest mortgage on the real property at issue with Defendant PNC in the principal amount of $75,000.00, an interest rate of 9.240%, and monthly payments of $771.06.

14. At all times relevant hereto, PNC is and was the servicer of the loan account.

15. Shortly after the origination of the loan, Plaintiff Barbara Davis was diagnosed with cancer and was scheduled to undergo surgery in or around the summer of 2002.

16. Not wanting to fall behind in her mortgage payments during recovery, Plaintiffs entered into an agreement with the local branch of Defendant PNC to fulfill their payment obligations up until in or around February 2004 by tendering a lump sum payment in the amount of $19,252.72 to be applied to their mortgage account in monthly installments.

17. By and through PNC's agents at its Hamilton, NJ branch, Defendant PNC agreed to apply the lump sum payment toward Plaintiffs' monthly payments on their home mortgage instead of accelerating Plaintiffs' monthly payments.

18. In accordance with their agreement to accept a lump sum payment from Plaintiffs, on or about April 15, 2002, Plaintiffs tendered the lump sum in the amount of $19,252.72.

19. This payment was supposed to pay Plaintiffs' PNC mortgage account ahead through February 2004.

20. In or about June 2002, two months later, PNC breached the agreement by refusing to apply the lump sum payment of $19,252.72 in accordance with the agreement stated herein.

21. PNC further refused to return the money, instead improperly applying the entire amount to the principal balance of Plaintiffs' account.

22. Upon learning that Defendant had breached the aforementioned agreement, Plaintiffs requested that Defendant refund the money to permit them to make monthly payments.

23. PNC rejected Plaintiffs' request and refused to return the money it had applied to Plaintiffs' principal balance.

24. Moreover, on or about September 12, 2002, PNC charged Plaintiffs a $38.55 late fee without explanation.

25. Approximately two days later, on or about September 14, 2002, without explanation, Defendant PNC automatically deducted a payment of $771.06 from Plaintiffs' checking account, causing Plaintiffs' checks to bounce.

26. At all times relevant hereto, PNC was not authorized to deduct said payment from Plaintiffs' checking account

27. In response thereto, on or about January 14, 2003, Plaintiffs contacted the Office of the Comptroller of the Currency regarding Defendant's improper actions.

28. On or about January 31, 2003, PNC offered to allegedly fix the aforementioned problem with Plaintiffs' account and return to them any and all monthly payments that would have to be prospectively applied to the account.

29. Defendant PNC, however, did not offer to return to Plaintiffs $3,994.69 in unpaid interest which had accrued on Plaintiffs' account as a direct result of Defendant's improper application of Plaintiffs' lump sum payment solely to the principal owed.

30. Plaintiffs believe and therefore aver that if Defendant had properly applied Plaintiffs' lump sum payment in accordance with the agreement to do so on a continued monthly basis, there would be no unpaid interest due and owing on Plaintiffs' account.

31. At all times relevant hereto, Plaintiffs consistently contacted PNC in person, by telephone, and in writing to complain of Defendant's wrongful actions.

32. At all times relevant hereto, PNC claimed that there were additional monies owed on the Plaintiffs' mortgage account as result of the improper application of the $19,252.72 tendered by Plaintiffs.

33. As a direct and proximate result of PNC's actions, an appearance of default was created by PNC.

34. As a direct and proximate result of PNC's actions, Plaintiff was unable to continue making monthly payments.

35. On or about January 12, 2005, PNC filed a mortgage foreclosure action against Plaintiffs as a direct result of PNC's actions as stated herein.

36. In an effort to save their home, Plaintiffs and PNC entered into a repayment plan to begin on or about February 23, 2005.

37. In accordance with the agreement, Plaintiffs were to tender $1,473.39 on or about February 23, 2005 and thereafter pay $1,542.12 on the 28th of each subsequent month until the mortgage account was brought up to date.

38. Plaintiffs made all payments required under the agreement and have since brought their mortgage account current according to PNC's records.

39. However, Plaintiffs believe and aver that the repayment plan would not have been needed had PNC properly applied the lump sum payment of $19,252.72.

40. As a result of PNC's conduct, Plaintiffs have suffered damages.

41. In servicing the loan at issue, PNC misrepresented to Plaintiffs the benefits, qualities, characteristics, risks, and costs of the loan.

42. As a direct and proximate result of Defendants' deceptive and confusing actions, Plaintiffs have suffered damages, including negative credit ratings on their credit reports, foreclosure notations, attorneys' fees, costs and emotional distress.

COUNT I
BREACH OF CONTRACT
PLAINTIFFS V. ALL DEFENDANTS

43. The above paragraphs are incorporated herein by reference.

44. At all times relevant hereto, Plaintiffs and Defendant were parties to a Note and Mortgage Agreement.

45. Pursuant to the contracts, Defendants were under various duties to Plaintiffs, including *inter alia,* properly servicing Plaintiffs' mortgage account.

46. Defendants had an implied duty to act in good faith in the execution and performance of the mortgage contract.

47. Defendant PNC charged the Plaintiffs expenses that were excessive and/or not bona fide, not reasonable, or not authorized pursuant to the parties' agreement.

48. Moreover, PNC breached its agreement with Plaintiffs by improperly applying the lump sum payment of $19,252.72 tendered by Plaintiffs as stated herein.

49. As a direct and proximate result of said breach of duties, Plaintiffs have sustained damages, including *inter alia,* foreclosure fees and costs, and other fees and costs assessed by PNC.

50. Defendant PNC has failed to service Plaintiffs' loan in good faith by charging unjustified and unreasonable late fees, interest charges, and attorneys' fees, and miscrediting Plaintiffs' account.

51. The Defendants' breach of their duty of good faith was intentional, willful, and/or wanton, and reasonably calculated to result in foreclosure of the Plaintiffs' real property.

52. By and through their actions, as aforesaid, Defendants breached said contractual duties.

53. As a direct and proximate result of said breach of duties, Plaintiffs have sustained damages.

WHEREFORE, Plaintiffs request that the Court enter judgment in their favor and against Defendants and Order Defendants to pay compensatory damages, and Order such further or additional relief as the interests of justice may require, and will ever pray.

COUNT II
VIOLATIONS OF NEW JERSEY CONSUMER FRAUD ACT, N.J.S.A. 56:8-1 *et seq.*
PLAINTIFFS V. ALL DEFENDANTS

54. The above paragraphs are incorporated herein by reference.

55. Plaintiffs and Defendants are "person[s]" pursuant to N.J. Stat. § 56:8-1.

56. The New Jersey Consumer Fraud Act, N.J. Stat. § 56:8-2 proscribes, inter alia, "use or employment by any person of any unconscionable business practice, deception, fraud, false pretense, false promise, [or] misrepresentation" with the intent that others rely upon such in connection with the sale of any real estate.

57. The actions of Defendants, as aforesaid, constitute an unconscionable business practice, false promise, or misrepresentation under the New Jersey Consumer Fraud Act, by way of the following, inter alia:

a. Defendants misrepresented to Plaintiffs the character, extent, or amount of the debt or its status in a legal proceeding;

b. Defendants engaged in fraudulent or deceptive conduct which created a likelihood of confusion or of misunderstanding;

c. Defendants misrepresented to Plaintiffs that the loan would be beneficial, when in fact it was not, and Defendants knew it was not; and

d. Defendants misrepresented the characteristics or benefits of the loan; and

e. Defendants misrepresented that they would properly apply the lump sum payment of $19,252.72 tendered by Plaintiffs to pay their mortgage account ahead while Barbara Davis was receiving from her medical condition.

58. As a direct and proximate result of said actions, Plaintiffs have suffered financial and other harm.

59. By virtue of the violations of law as aforesaid, and pursuant to the New Jersey Consumer Fraud Act, Plaintiff is entitled to an award of actual damages, treble damages, attorneys' fees, and costs of suit.

WHEREFORE, Plaintiffs pray the Honorable Court enter judgment in their favor, and against Defendants, for an Order declaring that Defendants violated the Consumer Fraud Act, actual damages, treble damages, an award of reasonable attorneys' fees and expenses, and costs of suit, and such additional relief as is deemed just and proper, or that the interests of justice may require.

V. JURY DEMAND

Plaintiffs hereby demand a jury trial as to all issues herein.

Respectfully submitted,

MILDENBERG AND STALBAUM, P.C.

Date: 4/3/06 **By:** [signature]

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